


APPEALS FOR TRIAL PROSECUTORS

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We will use a hypothetical case to discuss the different types of “appeals” that can arise in a felony case in superior court.

Please feel free to ask questions!



The diagram illustrates a four-stage legal appeals process. It features a large, light blue arrow pointing from left to right, which serves as the background for four blue rounded rectangular boxes. The boxes are arranged horizontally and contain the following text: 'Trial' with a bulleted list of 'Appeals by State' and 'Special Actions'; 'Direct Appeal' with a bulleted list of 'State Cross Appeal'; 'PCR'; and 'Federal Habeas Corpus'. The top of the slide has a decorative header with wavy blue and green lines.

Trial

- Appeals by State
- Special Actions

Direct Appeal

- State Cross Appeal

PCR

Federal Habeas Corpus


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graph LR; A[Guilty Plea] --> B[Of-Right PCR]; B --> C[Second Of-Right PCR]; C --> D[Federal Habeas Corpus];
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Guilty
Plea

Of-Right
PCR

Second
Of-Right
PCR

Federal
Habeas
Corpus

Felony Case in Superior Court

State v. DiCaprio



- Facts of the crimes:
After getting into a heated argument, Leonardo DiCaprio shoots and kills George Clooney.
Brad Pitt tries to intervene and DiCaprio points a gun at Brad.



State v. DiCaprio - Charges

- State presents case to grand jury and DiCaprio indicted on two charges:
 - Count One – First-degree murder (George Clooney)
 - Count Two – Aggravated Assault (Brad Pitt)



Appeals by the State

- A.R.S. § 13-4032 governs when the State may appeal.
- State can appeal:
 - Order dismissing a charging document;
 - Order granting a new trial;
 - A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment;
 - A post-judgment order affecting the substantial rights of the state or a victim, only if victim requests appeal;
 - An illegal sentence;
 - Order granting motion to suppress the use of evidence; and
 - A post-verdict judgment of acquittal.



Appeals by the State

- Criminal Rules of Procedure 31 governs this appeal.
 - New rules take effect in January 2018.
- Must file notice of appeal within 20 days of order being appealed. Ariz. R. Crim. P. 31.2(a)(2).



Special Actions

- Special action jurisdiction is discretionary and appropriate only when there is no equally plain, speedy, and adequate remedy by appeal.
- Be sure to consult rules of procedure for special actions.
- Time-frames for special actions are quick.
 - Typically 7 days to respond.
 - Be sure to check whether the Court of Appeals has already declined jurisdiction before you write a response.



Special Actions

- Record must be adequate for review of an issue.
 - Submit an appendix with relevant record and cite to it in the petition.
 - Appendix should include:
 - Relevant written motions and responses.
 - Relevant exhibits admitted at evidentiary hearings.
 - Relevant written court rulings.
 - Relevant transcripts.
- Appendix must be filed separately, with table of contents and bookmarks or hyperlinks.



Special Actions

- Review of Court of Appeals decision by petition for review to Arizona Supreme Court
 - Note: Not a special action in Supreme Court; it will be a civil case and governed by Arizona Rules of Civil Appellate Procedure.
- 30 days to file petition for review
 - Must attach decision of Court of Appeals, or Superior Court decision if Court of Appeals declines jurisdiction.
 - Response due 30 days after service of Petition.
 - No reply unless ordered by Court.



Special Actions

- Common issues raised by defendant on special actions:
 - Denial of bond
 - Motions for remand to the grand jury
 - Double Jeopardy claim after initiation of second prosecution
 - Speedy trial/Rule 8 claims



State v. DiCaprio – Grand Jury

- Motion for remand to grand jury – Alleging prosecutor failed to give a justification instruction to the jury. *See Cespedes v. Lee*, 243 Ariz. 46 (2017).
- A defendant must challenge a decision denying a motion for remand by special action before trial.
- If a motion to remand is granted, State can challenge by special action. If an indictment (or other charging document) is dismissed, State may file an appeal. *See* A.R.S. § 13-4032(1).

State v. DiCaprio - Special Action/Appeal #1

- When police arrived on scene, DiCaprio made some admissions prior to receiving *Miranda* warnings.
- DiCaprio files motion to suppress his statements based on an alleged *Miranda* violation.
- Trial court grants motion to suppress - State's remedy is to file an appeal. *See* A.R.S. § 13-4032(6). If statements are necessary for case and you have a good argument, consider filing an appeal. In hypothetical case, State appealed and prevailed when the Court of Appeals held DiCaprio was not "in custody" when he made incriminating statements.
- If trial court had denied motion to suppress – DiCaprio could have tried to file special action. In a response, be sure to note that a defendant has remedy to raise issue on direct appeal.



Suppression Issues Generally

- Make a thorough record.
- Make alternative arguments or lose them on appeal.
 - E.g. Good-faith exception, inevitable discovery, and independent source doctrine.
- Leave hearing exhibits in the record and use other copies for trial.

State v. DiCaprio – Special Action #2

- DiCaprio seeks subpoenas for Brad Pitt's counseling records and other records related to his divorce. The trial court grants request over the State's and victim's objection.
- State files special action.
- Think about filing special actions to protect victim's information if entirely unnecessary to a defense and request only made for harassment.
 - Be sure not relevant to a defense.





State v. DiCaprio – Special Action #3

- Mid-trial, DiCaprio files a special action to challenge a trial court's ruling.
- Unless DiCaprio gets a stay, trial will continue at the same time the Court of Appeals is considering the special action.
- Rule 65 of the Rules of Civil Procedure governs stays.
 - Must first file request for stay in trial court.
 - If denied, then go to Court of Appeals (must file with special action petition).



State v. DiCaprio – Rule 20/Verdict

- DiCaprio makes a Rule 20 motion to the court regarding both counts; the trial court denies the motion as to Count 1, but grants it as to Count 2.
- Remedy?
 - There is no remedy. State may not appeal a trial court's pre-verdict grant of a judgment of acquittal. *See Evans v. Michigan*, 568 U.S. 313, 318 (2013).
- State may appeal a post-verdict judgment of acquittal. *See A.R.S. § 13-4032(7)*.



State v. DiCaprio – Direct/Cross Appeals

- DiCaprio files a timely notice of appeal (within 20 days of sentencing).
- State can cross-appeal, and must file notice within 20 days after service of defendant's notice of appeal. Ariz. R. Crim. P. 31.2(a)(2)(C).
- Please let the Criminal Appeals Section of the Attorney General's Office know if you file a cross-appeal. Preferably by letter that can be put in the file.



State v. DiCaprio – Cross Appeal

- Trial judge imposed a sentence of life with the possibility of release in 25 years for Count 1, which was based on premeditated first-degree murder.
- A.R.S. § 13-752(A) requires a natural life sentence. Thus, the sentence is illegally lenient.
- The State MUST file a cross-appeal to remedy an illegally lenient sentence.



Direct Appeals Generally

- Governed by Arizona Rule of Criminal Procedure 31.
- After notice of appeal is filed, the record is sent from trial court to court of appeals and transcripts are prepared.
 - Contents of record – Rule 31.8(a).
 - Transcripts – Rule 31.8(b).
 - Must file designation of record within 30 days of filing notice of appeal.
 - Can supplement record by court order.
- The record is the universe on appeal.



Direct Appeals Generally

- Once record complete, clerk files completion of the record.
 - Opening brief due 40 days after clerk distributes notice.
 - Answering brief due 40 days after service of Opening Brief.
 - Reply brief is optional and due 20 days after service of Answering brief.
- Contents of brief governed by new Rule 31.10.
 - Only have to cite to Arizona reporter.
 - Use victim identifier for juveniles or victims of sexual offenses.



Direct Appeals Generally

- When briefing is complete, case is assigned to a 3-judge panel of the Court of Appeals.
- Court of Appeals could hold oral argument (usually only does so if requested).
- Court of Appeals will either issue a memorandum decision or a published opinion.
 - Memorandum decisions issued on or after January 1, 2015 may be cited for persuasive value.
 - Must attach or provide a link to a free copy (not Westlaw).



Direct Appeals Generally

- Motions for reconsideration governed by new Rule 31.20.
 - Must be filed within 15 days of decision.
 - Cannot respond to motion for reconsideration unless ordered by the court.
- Petitions for review governed by new Rule 31.21.
 - Must file within 30 days of decision or 15 days from final disposition of a motion for reconsideration.
 - Response, if filed, due 30 days after service of petition.



State v. DiCaprio – Direct Appeal

- DiCaprio files an opening brief raising four issues:
 - (1) Sufficiency of the evidence;
 - (2) Prosecutorial misconduct;
 - (3) *Miranda* violation; and
 - (4) Challenging admission of 404(b) evidence.



State v. DiCaprio – Direct Appeal

- (1) Sufficiency of the Evidence.
 - This issue is subject to *de novo* review; No deference given to trial court.
 - Seminal case is *Jackson v. Virginia*, 443 U.S. 307 (1979)
 - Arizona case: *State v. West*, 226 Ariz. 559 (2011).



State v. DiCaprio – Direct Appeal

- (2) Prosecutorial misconduct – Alleging the prosecutor committed misconduct during closing argument.
 - No objection below.
 - Fundamental error review. *See State v. Henderson*, 210 Ariz. 561 (2005).
 - Defendant must prove:
 - (1) Error occurred;
 - (2) The error was fundamental—“error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial”; and
 - (3) Resulting prejudice.



State v. DiCaprio – Direct Appeal

- (3) *Miranda* violation
 - This was same issue already litigated in State's pre-trial appeal and Arizona Court of Appeals issued a decision.
 - Law of the case would likely apply.
 - If court did review issue, deference is given to the trial court's factual determination, but legal conclusions reviewed *de novo*.



State v. DiCaprio – Direct Appeal

- (4) Challenging admission of 404(b) evidence.
 - This issue litigated at hearing below and, thus, reviewed for an abuse of discretion.
 - Be sure to be specific about why other-act evidence is admissible and relevant to the case; do not just generally list reasons contained in Rule 404(b).
 - When an issue is preserved, State has burden of proving harmless error.
 - Constitutional v. non-constitutional error.
 - Constitutional – Harmless beyond a reasonable doubt
 - Non-constitutional – Reasonable probability the verdicts would have been different



State v. DiCaprio – Direct Appeal

- Arizona Court of Appeals issues memorandum decision affirming conviction and sentence.
- DiCaprio files petition for review to Arizona Supreme Court, which is summarily denied.
- DiCaprio could file petition for writ of *certiorari* to the United States Supreme Court on federal issues.
 - Must file within 90 days of Arizona Supreme Court order.



Post-Conviction Relief

- A post-conviction relief (PCR) proceeding typically follows a direct appeal.
 - Although, an appeal can be suspended pending a Rule 32 proceeding. *See* Ariz. R. Crim. P. 31.3(b).
- Governed by Rule 32 of the Arizona Rules of Criminal Procedure.
- A defendant initiate by filing PCR Notice, within the *later* of:
 - 90 days after entry of judgment and sentence; or
 - 30 days after the issuance of the order and mandate in the direct appeal. *See* Ariz. R. Crim. P. 32.4(a)(2)(D)



Post-Conviction Relief

- For guilty pleas, defendants can initiate an “of-right” PCR proceeding.
 - Defendants can also initiate a second “of-right” PCR proceeding to challenge the effectiveness of Rule 32 counsel in the first of-right proceeding.
- Timeliness
 - 1st of-right proceeding – 90 days after sentencing
 - 2nd of-right proceeding – 30 days after final order or mandate in 1st of-right proceeding
 - Note: Mailbox rule applies to time limitations in Rule 32..
 - *See Ariz. R. Crim. P. 32.4(a)(2)(C).*



Post-Conviction Relief

- There are three mutually exclusive paths to preclusion of claims:
 - Rule 32.2(a)(1) – Defendant still has time to raise claim on appeal or Rule 24 motion.
 - Rule 32.2(a)(2) – Defendant already raised the claim and it was adjudicated on the merits.
 - Rule 32.2(a)(3) – Defendant never raised the claim when he had a chance to do in trial court, on direct appeal, or in previous Rule 32 proceeding.
- Difference between (a)(2) and (a)(3) very important!



Post-Conviction Relief

- The timeliness rule and preclusion rules only apply to claims raised pursuant to Rule 32.2(a), (b), and (c):
 - (a) Conviction or sentence violates United States or Arizona Constitution.
 - (b) Court lacked jurisdiction to render judgment or impose sentence.
 - (c) Illegal sentence.



Post-Conviction Relief

- The timeliness rule and preclusion rules DO NOT apply to claims in Rule 32.1(d)-(h):
 - (d) The person is being held in custody after the sentence imposed has expired.
 - (e) Newly discovered evidence.
 - (f) The failure to file a timely of-right PCR notice or notice of appeal was not the defendant's fault.
 - (g) Significant change in the law.
 - (h) Actual innocence.
- These claims must be resolved on the merits.



Post-Conviction Relief

- Practice tips:
 - Make separate arguments on timeliness rules and preclusion rules, and be sure to specify which specific preclusion rule applies.
 - Know the difference between of-right PCR proceeding and a non-pleading PCR proceeding.
 - PCR rulings must be clear, or there might be future litigation in federal court.
 - If ruling is unclear, consider filing motions for clarification.



State v. DiCaprio – PCR Proceeding

- DiCaprio initiates a timely PCR proceeding by filing a PCR notice within 30 days of issuance of mandate in direct appeal.
- Trial court will appoint attorney if he not represented and indigent. Ariz. R. Crim. P. 32.4(b).
- DiCaprio must file a petition within 60 days of either appointment of counsel, or, if counsel is not appointed, the later of the filing of PCR notice or order denying appointment of counsel.



State v. DiCaprio – PCR Proceeding

- DiCaprio's attorney files a timely PCR petition raising four claims:
 - (1) Prosecutorial Misconduct.
 - (2) Ineffective Assistance of Trial Counsel related to failure to object to alleged Prosecutorial Misconduct.
 - (3) Erroneous admission of gun expert.
 - (4) Ineffective Assistance of Trial Counsel related to failure to object to admission of gun expert.



State v. DiCaprio – PCR Proceeding

- If DiCaprio's counsel found no arguable claims to raise, would have filed a notice instead of petition, and DiCaprio would have been given option of filing *pro se* petition.
- In an of-right PCR proceeding, counsel must file something similar to an *Anders* brief. See Ariz. R. Crim. P. 32.4(d)(2)(A).
 - Court of Appeals case pending on whether trial court must follow *Anders* procedures in a first of-right PCR proceeding.
 - One federal judge has concluded it is required.



State v. DiCaprio – PCR Proceeding

- The State has 45 days to file a response. Ariz. R. Crim. P. 32.6(a).
 - 1st extension for “good cause”
 - 2nd or more extensions for “extraordinary circumstances and after considering the rights of the victim”
- Defendant may file a reply 15 days after service of Response.



State v. DiCaprio – PCR Proceeding

- If all claims untimely, precluded, and/or fail to present a material issue of fact or law, court must summarily dismiss the petition. Ariz. R. Crim. P. 32.6(d)(1).
- If there is a material issue of fact or law, hearing will be set. Ariz. R. Crim. P. 32.6(d)(2).
 - Note: State must notify victim of hearing date, if victim has requested such notice. Ariz. R. Crim. P. 32.6(d)(3).
 - Rule 32.8 governs the evidentiary hearing.



State v. DiCaprio – PCR Proceeding

- (1) Prosecutorial misconduct
 - This is based on the same allegation as on direct appeal, alleging the prosecutor committed misconduct during closing argument.
 - This claim is precluded under Rule 32.2(a)(2) because already adjudicated on the merits in the direct appeal.



State v. DiCaprio – PCR Proceeding

- (2) Ineffective Assistance of Trial Counsel related to failure to object to alleged Prosecutorial Misconduct.
 - This claim argues counsel should have objected on the grounds of prosecutorial misconduct during closing argument.
 - This claim is NOT precluded and must be adjudicated on the merits.
 - IAC claims may only be raised in a PCR proceeding. *See State v. Spreitz*, 202 Ariz. 1 (2002).
 - **DO NOT** argue IAC claims are precluded from a first Rule 32 proceeding.



State v. DiCaprio – PCR Proceeding

- (3) Erroneous admission of gun expert.
 - This is a claim raised for the first time in a PCR proceeding and could have been raised at the trial court and in the direct appeal.
 - Therefore, it is precluded under Rule 32.2(a)(3).



State v. DiCaprio – PCR Proceeding

- (4) Ineffective Assistance of Trial Counsel related to failure to object to admission of gun expert.
 - Although the substantive claim is precluded, the IAC claim related to substantive claim is not precluded.
 - This claim must be resolved on the merits.
 - Seminal case is *Strickland v. Washington*, 466 U.S. 668 (1984).
 - Two part test: A defendant must show:
 - (1) that his attorney's performance was deficient and
 - (2) that he was prejudiced as a result.
 - Encourage the court to rule on both prongs of *Strickland*.



State v. DiCaprio – PCR Proceeding

- Trial court summarily denies PCR petition.
- DiCaprio could either file a motion for rehearing within 15 days of final order, or a petition for review to the Court of Appeals within 30 days of final order. *See* Ariz. R. Crim. P. 32.9.
- Cross-petition for review may be filed within 15 days of service of petition for review.



State v. DiCaprio – PCR Proceeding

- Failure to raise an issue in a petition for review constitutes waiver of that issue. Ariz. R. Crim. P. 32.9(c)(4)(D).
 - Note: A defendant can incorporate his PCR petition by reference if it is attached as an appendix. Ariz. R. Crim. P. 32.9(c)(5)(A).



State v. DiCaprio – PCR Proceeding

- Response due 30 days after petition is served.
 - Note: AG's Office does not represent State in PCR appeals.
 - The Court of Appeals is now issuing decisions in every PCR case.
 - Consider filing responses.
 - COA decision is very important for habeas proceedings. If it resolves the case incorrectly, could affect habeas review.
 - Consider filing motions for clarification or reconsideration.
- Reply may be filed 10 days after response.



State v. DiCaprio – PCR Proceeding

- Court of appeals affirms trial court in memorandum decision, granting review, but denying relief.
- BUT court generally says claims 1 and 3 are precluded under Rule 32.2(a).
 - This could lead to major problems in federal habeas proceeding.
 - File motion for reconsideration to have court clarify that claim 1 is precluded under Rule 32.2(a)(2) and claim 3 is precluded under Rule 32.2(a)(3).



State v. DiCaprio – PCR Proceeding

- DiCaprio could file petition for review to the Arizona Supreme Court.
 - Deadline is 30 days after decision.
 - Court will either summarily deny review or grant review.
- If federal issue is involved, could file a petition for writ of *certiorari* in U.S. Supreme Court.



Federal Habeas Corpus Proceeding

- What is it?
 - It's the last hope for scoundrels or the last refuge of the innocent.
 - Federal court review of federal constitutional claims first presented in AZ courts.
 - The purpose is to preserve federal constitutional rights; *not* to correct errors of state law.
 - Governed by The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *See* 28 U.S.C. § 2254.



Federal Habeas Corpus Proceeding

- Clear and correct procedural rulings lead to procedural bar of claims in federal court.
- Failure to have clear and correct procedural rulings can lead to *de novo* review of the merits of claims for first time in federal court.
- Merits decisions of state courts deferentially reviewed in federal court, limited to evidence in state court proceeding, and limited to only holdings of U.S. Supreme Court cases.



Federal Habeas Corpus Proceeding

- Habeas petitioner generally has one year after direct review concludes to file federal habeas petition. *See* 28 U.S.C. § 2244(d)(1).
- Statute of limitations is tolled during “properly filed” post-conviction proceeding. *See* 28 U.S.C. § 2244(d)(2).
 - Untimely PCR does not toll statute of limitations. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).



State v. DiCaprio – Habeas Proceeding

- DiCaprio files a timely federal habeas petition (within 1 year of conclusion of direct review, excluding time when PCR proceeding was pending).
- If he raises any of his federal claims he presented to state court (*Miranda*, IAC claims, Prosecutorial Misconduct), they will be deferentially reviewed in federal court.
- Any of his state law claims (404(b)), would not be cognizable in a habeas proceeding.
 - It is helpful when decisions differentiate between federal and state law claims.

Questions?

